

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PB INDUSTRIES, INC.	:	
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2002 through August 31, 2005.	:	<hr/>

In the Matter of the Petition	:	ORDER
of	:	DTA NOS. 821808
WILLIAM GOODWIN	:	AND 821809
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2003 through August 31, 2005.	:	

Petitioner PB Industries, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2002 through August 31, 2005.

Petitioner William Goodwin filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through August 31, 2005.

A hearing was scheduled before Presiding Officer Thomas C. Sacca at the offices of the Division of Tax Appeals, State Office Building, Room 3A2, 250 Veterans Memorial Highway, Hauppauge, New York, on Wednesday, July 9, 2008 at 10:45 A.M. Petitioners failed to appear

and a default determination was duly issued. Petitioners have made a written request dated August 12, 2008 that the default determination be vacated. The Division of Taxation did not file a response in opposition to petitioners' application.

Petitioners, PB Industries, Inc., and William Goodwin, appeared by Milton Shaiman, Esq.

Upon a review of the entire case file in this matter as well as the arguments presented for the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On August 9, 2007, petitioners filed petitions challenging the assessment of sales and use tax. Petitioners argued that the tax in question had already been paid.

2. On June 2, 2008, the Division of Tax Appeals issued to the parties a Notice of Small Claims Hearing scheduling a small claims hearing for Wednesday July 9, 2008 at 10:45 A.M. at the State Office Building, Room 3A2, 250 Veterans Memorial Highway, Hauppauge, New York.

3. On July 9, 2008, Presiding Officer Thomas C. Sacca called the ***Matter of PB Industries, Inc.*** and the ***Matter of William Goodwin***, involving the petitions here at issue. Petitioner PB Industries, Inc., failed to appear at the hearing either by an officer or employee of the corporation or by its authorized representative. Petitioner William Goodwin also failed to appear at the hearing either in person or by his duly authorized representative. No one representing either petitioner attempted to contact the Division of Tax Appeals in any manner. The representative of the Division of Taxation (Division) moved that petitioners be held in default.

4. On July 17, 2008, Presiding Officer Sacca found petitioners in default and denied both petitions.

5. Petitioners filed an application dated August 12, 2008 to vacate the July 17, 2008 default. In their application, petitioners explain that their representative was unable to attend the hearing due to a death in his family. Petitioners have submitted satisfactory proof of said death. With respect to the merits of their case, petitioners argue that the amount of tax due should have been reduced by that portion of the tax already paid by another taxpayer.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “In the event a party or the party’s representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.” (20 NYCRR 3000.13[d][2].) The rules further provide that: “Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioners did not appear at the hearing scheduled in this matter or obtain an adjournment. Therefore, the small claims presiding officer correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioners to show a valid excuse for not attending the hearing and to show that they have a meritorious case (20 NYCRR 3000.13[d][3]; *see also Matter of Zavalla; Matter of Morano’s Jewelers of Fifth Avenue*).

C. Petitioners have demonstrated that reasonable cause exists for their absence from the hearing. While one would have expected the simple courtesy of a call from petitioners’

representative to say that he could not attend the hearing, the death in his family establishes that reasonable cause exists nonetheless.

D. With respect to the merits of the case, it would appear that petitioners performed taxable services for a customer without collecting the proper sales tax. Petitioners have alleged that the sales tax was ultimately collected from their customer by the Division when the customer was audited. Certainly, the Division is entitled to collect tax due from either the vendor or the vendee under such circumstances. However, petitioners' assessment would have to be reduced to the extent that some or all of the tax due has already been paid by petitioners' customer. While petitioners have not as yet offered any proof that this is the case, they should be given the opportunity to do so at hearing. Accordingly, petitioners have demonstrated that they have a meritorious case.

E. It is ordered that the application to vacate the default determinations be, and it is hereby, granted and the Default Determinations issued on July 17, 2008 are vacated.

DATED: Troy, New York
December 4, 2008

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE